No. 88-1122

Supreme Court, U.S.
FILED
JAN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

BERNHARD GOETZ,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MARK M. BAKER
Attorney for Petitioner
Bernhard Goetz
225 Broadway, Suite 2100
New York, New York 10007
(212) 964-3200

SLOTNICK & BAKER
BARRY IVAN SLOTNICK
Of Counsel

QUESTION PRESENTED FOR REVIEW

Did the trial judge create the potential for a directed verdict of guilty, thereby violating the Sixth Amendment and due process of law, by instructing the jury that it "must", as opposed to "may", convict petitioner if it found the elements of the crime in issue to have been alone proven beyond a reasonable doubt?

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BERNHARD GOETZ,

Petitioner,

- against -

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

Parties to the Proceedings Below

Petitioner, Bernhard Goetz, seeks a Writ of Certiorari to review an order of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, insofar as it affirmed a conviction entered in the Supreme Court of

the State of New York, New York County (Hon. Stephen G. Crane).

There are no parties to this proceeding other than those above-referenced.

TABLE OF CONTENTS

	PAGE
Question Presented For Review. . . .	i
Parties to the Proceedings Below . .	ii
Table of Authorities	v
Jurisdiction and Opinions Below. . .	1
Constitutional Provisions Involved .	2
Statement of the Case.	4
A. The Indictment.	4
B. The Trial Court's Instructions.	5
C. The Verdict and Sentence. .	6
D. The Appeal.	7
Reasons for Allowance of the Writ. .	10
Conclusion	18
Appendix	

TABLE OF AUTHORITIES

CASES	PAGE
Bollenbach v. United States, 326 U.S. 607 (1946).	11
Carothers v. United States, 161 F.2d 718 (5th Cir. 1947) . . .	12
Horning v. District of Columbia, 1254 U.S. 135 (1920)	14
Killian v. United States, 368 U.S. 231 (1961).	10
Schwachter v. United States, 237 F.2d 640 (6th Cir. 1956) . . .	12
Sparf v. United States, 156 U.S. 51 (1895)	10,13
United States v. Dougherty, 473 F.2d 1113 (D.C.Cir. 1972). . .	12,13
United States v. Gollin, 166 F.2d 123 (3d Cir.), cert. denied, sub nom, Richman v. United States, 333 U.S. 875 (1948)	12
United States v. Hayward, 420 F.2d 142 (D.C.Cir. 1969) . . .	9,10
Brascomb v. State, 261 Ark. 614, 550 S.W.2d 450 (1977)	9,17
People v. Cargile, 83 Mich.App. 361, 268 N.W.2d 258 (1978)	17
People v. Gillespie, 54 Mich.App. 419, 221 N.W.2d 246 (1974)	17

TABLE OF AUTHORITIES (Cont'd)

CASES	PAGE
People v. Goetz, 141 A.D.2d 446, 529 N.Y.S.2d 782 (1st Dept. 1988) aff'd, ___ N.Y.2d ___, ___ N.Y.S.2d ___ (1988).	1
State v. DeVoe, 301 A.D.2d 541 (Me. 1973).	17
State v. Ragland, 105 N.J. 189, 519 A.2d 1361 (1986)	15,16
Straughter v. State, 247 A.2d 202 (Del. 1986)	17
CONSTITUTIONAL PROVISIONS	
Amendment VI	2,7,14
Amendment XIV.	2-3,7, 14
STATUTES	
28 U.S.C. §1257(3)	1
New York Criminal Procedure Law §190.75(3) (McKinney, 1982). . . .	4
New York Penal Law §110.00 (McKinney 1987).	5
New York Penal Law §120.10(1) (McKinney 1987).	5
New York Penal Law §120.25 (McKinney 1987).	5
New York Penal Law §125.25(1) (McKinney 1987).	5

TABLE OF AUTHORITIES (Cont'd)

STATUTES	PAGE
New York Penal Law §265.01 (McKinney 1980).	4
New York Penal Law §265.02(4) (McKinney 1980).	4
New York Penal Law §265.01(1) (McKinney 1980).	4
New York Penal Law §265.03 (McKinney 1980).	5

MISCELLANEOUS

Rules of the Supreme Court Rule 17.1(c)	16
Rules of the Supreme Court Rule 17.1(b)	17

Jurisdiction and Opinions Below

The as yet unpublished decision of the New York Court of Appeals in People v. Goetz, affirming the order of the Appellate Division was entered on November 22, 1988 (Appendix).

The decision of the Appellate Division, First Department, is reported at 141 A.D.2d 446, 529 N.Y.S.2d 782.

Jurisdiction is conferred upon this court pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions Involved

Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment Fourteen, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

A. The Indictment

Under consolidated indictment number 476-1914/85 filed in New York County, petitioner Bernhard Goetz was charged with various offenses arising out of a shooting incident in a New York City IRT subway train on December 22, 1984. Among the charges returned by two separate grand juries[1] were one count of Criminal Possession of a Weapon in the Third Degree (New York Penal Law §265.02[4] [McKinney 1980]), two counts of Criminal Possession of a Weapon in the Fourth Degree (id., §265.01[1]), four counts of Attempt to Commit Murder in the Second Degree (one

---

[1] The first grand jury only returned weapons charges while refusing to indict petitioner on any shooting-related offenses. Pursuant to authorization under New York Criminal Procedure Law §190.75(3) (McKinney 1982), a second grand jury returned the remainder of the consolidated indictment.

count as to each "victim") (id., §§110.00, 125.25[1] [McKinney 1987]), four counts of Assault in the First Degree (id., §120.10[1]), one count of Criminal Possession of a Weapon in the Second Degree (id., §265.03 [McKinney 1980]),[2] and one count of Reckless Endangerment in the First Degree (id., §120.25).

B. The Trial Court's Instructions

With respect to the various charges in the indictment -- and specifically that of Criminal Possession of a Weapon in the Third Degree -- the trial judge, amidst petitioner's protest that such amounted,

---

[2] The additional element included in Criminal Possession of a Weapon in the Second Degree, as opposed to the weapons charges returned by the first grand jury, was the intent to use the weapon unlawfully (New York Penal Law §265.03 [McKinney 1980]).

inter alia, to a "directed verdict",[3] instructed the jury as follows at the end of the trial:

> ...with respect to Count One of the Indictment, if you find that the People have proved to your satisfaction beyond a reasonable doubt each of the five elements as I have just explained them, then you must find the defendant guilty of the crime of Criminal Possession of a Weapon in the Third Degree (emphasis added)[4]

C. The Verdict and Sentence

Pursuant to its deliberations, the jury acquitted petitioner of all charges except for Criminal Possession of a Weapon

---

[3] Petitioner's objection was registered in a memorandum of law in support of his request for the less coercive "may" language. An additional exception was taken after the court's charge to the jury.

[4] The District Attorney argued in the State courts that the issue raised herein had not been appropriately preserved. However, both the Court of Appeals and the Appellate Division obviously disagreed and reached the merits of petitioner's claim.

in the Third Degree. The Court later imposed a split sentence of six months' imprisonment, followed by four and a half years' probation, which would include mandatory counseling from a therapist of defendant's own choosing, as well as a specified period of community service. A fine of $5000 was also imposed.

D. The Appeal

On appeal to the Appellate Division, in addition to raising issues addressed to the legality and propriety of the sentence, petitioner challenged the trial court's use of the mandatory "must" language with respect to the charge of Criminal Possession of a Weapon in the Third Degree as violative of the Sixth Amendment and due process of law. Petitioner argued that the use of such coercive terminology had the potential of directing a verdict by encroaching upon the jury's exclusive and constitutionally sanctioned discretion to

determine "ultimate" guilt -- above and beyond its responsibility of merely considering the elements of a charged offense.

Upon considering petitioner's arguments on the merits, the Appellate Division rejected the constitutional "directed verdict" contention while finding the sentence to have been illegally imposed. The matter was thus remanded for the sole purpose of resentence.

Following the granting of leave to appeal to the New York Court of Appeals that aspect of the Appellate Division's order which affirmed the underlying conviction, the State's highest court affirmed the order of the Appellate Division insofar as it had rejected petitioner's "directed verdict" contention (Appendix). Specifically addressing petitioner's federal constitutional

concerns, the Court of Appeals stated, inter alia, that,

> [c]ontrary to defendant's assertion, the jury instruction does not amount to a directed verdict because it does not encroach upon the jury's exclusive fact-finding prerogative by removing from its consideration some element of a crime or of [sic.] a defense to it (cf. United States v. Hayward, 420 F.2d 142 [D.C.Cir. 1969]; Brascomb v. State, 550 S.W.2d 450 [AR 1977]) (Appendix).

Reasons for Allowance of the Writ

The precise issue raised in this petition has never been squarely addressed by this Court and would, if considered, impact greatly upon the administration of criminal justice in each state of the Union. To be sure, although mandatory language similar to that employed by the trial judge herein has been involved in cases that have earlier survived the scrutiny of the Supreme Court, see, e.g., Sparf v. United States, 156 U.S. 51 (1895); Killian v. United States, 368 U.S. 231, 249, n.5 (1961), in each of those situations the issue before the court was not the constitutional infirmity in the instructions, but only whether the defendant had had a legitimate right to argue the concept of "jury nullification" to the jury -- something which petitioner has never urged he had a right to do.

The fact is that the two concepts are mutually exclusive. The best demonstration of this reality arises out of a consideration of two distinct opinions of the United States Court of Appeals for the District of Columbia Circuit. Thus, in United States v. Hayward, supra, when squarely confronted with the issue of such mandatory "must" language, the court held the following:

> The rule that a directed verdict of guilty is invalid is enforced no matter how conclusive the evidence in the case may be. While the judge in this case did not direct a verdict of guilty in form, that is the substantive effect of the instruction given. The rule against directed verdicts of guilt includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true. As the Supreme said in Bollenbach v. United States, 326 U.S. 607, 614 (1946), "the

> question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts". See also, Schwachter v. United States, 237 F.2d 640, 644 (6th Cir. 1956); United States v. Gollin, 166 F.2d 123, 127 (3d Cir.), cert. denied, 333 U.S. 875 (1948); Carothers v. United States, 161 F.2d 718, 722 (5th Cir. 1947) (footnote omitted).

Nonetheless, only a year and a half later, in United States v. Dougherty, 473 F.2d 1113 (D.C.Cir. 1972), the same court soundly rejected a defendant's right to a jury nullification charge.[5] In so doing, the court, noting the "informal" sources of knowledge which a jury already has in learning of its mercy-dispensing powers, took occasion to observe that,

> [e]ven indicators that on their face seem too weak to

---

[5] Significantly, Chief Judge Bazelon sat on both panels.

> notice -- like the fact that the judge tells the jury it must acquit (in case of reasonable doubt) but never tells the jury in so many words that it must convict -- are a meaningful part of the jury's input (emphasis added).

473 F.2d at 1135.

The end result is readily apparent. Although on the one hand, a defendant has no right either to argue or to have the judge charge on the concept of jury nullification, see Sparf, supra, Dougherty, supra, by the trial judge's using the mandatory "must" language, the potential for the exact opposite result obtains. Thus, under the instant facts, where Criminal Possession of a Weapon in the Third Degree under New York law is a strict liability offense, instead of avoiding having the jury nullify what otherwise would have been a conviction that was all but inevitable through the rejection of the requested term "may" and its consequent

use of the protested term "must", the court potentially accomplished the reverse.

Specifically, if an irresponsible jury is bent on nullifying "...in the teeth of both law and fact", Horning v. District of Columbia, 254 U.S. 135, 138 (1920), it will do so regardless of what language a trial judge employs. On the other hand, by employing the mandatory "must" language with respect to the five statutory elements alone, the court conceivably directed a guilty verdict on the part of this painstakingly selected and extraordinarily conscientious jury that may very well not have been otherwise returned under the peculiar facts of this case. Hence, where the jury, by such compulsive language, was even potentially precluded from considering all factors, beyond the mere statutory elements, toward its determination of petitioner's "ultimate guilt" (such as the fact of his several prior muggings and his

earlier unsuccessful attempt to secure a carrying permit), there was an equally potential violation of petitioner's constitutional rights to a fair and impartial jury under the Sixth Amendment and due process of law.

The constitutional concerns raised in this petition were perhaps best articulated by the dissent in the recent four-to-three decision of the New Jersey Supreme Court in State v. Ragland, 105 N.J. 189, 519 A.2d 1361 (1986). As therein explained:

> An instruction possessing this compulsive connotation stands at variance with the fine discretion that a jury must exercise when it is considering the myriad factors, definable and indefinable, obvious and subliminal, that bear upon the ultimate determination of criminal guilt or innocence. Against this risk of subtle but real prejudice, I do not see any actual benefit to be derived from the use of this language. Accordingly, I think it advisable that such language be discontinued because of its potential to

> be interpreted in a manner that compromises jury independence and blurs the accepted dichotomy between judge and jury.

105 N.J. at 220 (dissent per Handler, J.).

Assuming the correctness of petitioner's contentions, therefore, the administration of criminal justice in this country, on a state-by-state basis, and throughout the federal district courts, becomes increasingly suspect. From this standpoint alone, the instant petition raises "...an important question of federal law which has not been, but should be, settled by this court...". Rules of the Supreme Court, Rule 17.1(c). Moreover, to the extent that the New York Court of Appeals in this case, as well as the New Jersey Supreme Court in State v. Ragland, supra, can be read to be in conflict with the District of Columbia Circuit Court of Appeals in United States v. Hayward, supra, it is also apparent that "...a state court

of last resort has decided a federal question in a way in conflict with decisions of...a federal court of appeals". Rules of the Supreme Court, Rule 17.1(b). Indeed, several other state courts of last resort also appear to be in conflict both with Hayward and with each other. Compare, e.g., State v. Devoe, 301 A.2d 541 (Me. 1973) and Straughter v. State, 247 A.2d 202 (Del. 1968) to Brascomb v. State, supra, and People v. Gillespie, 54 Mich.App. 419, 221 N.W.2d 246, 247 (1974).[6] We ask this court to consider this issue, therefore, and establish a uniform standard in conformity with Sixth Amendment constraints.

---

[6] But see, People v. Cargile, 83 Mich.App. 361, 268 N.W.2d 258 (1978).

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated: New York, New York
January 4, 1989

Respectfully submitted,

MARK M. BAKER
Attorney for Petitioner
Bernhard Goetz
225 Broadway, Suite 2100
New York, New York 10007
(212) 964-3200

SLOTNICK & BAKER
BARRY IVAN SLOTNICK

- Of Counsel -

APPENDIX

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

STATE OF NEW YORK
COURT OF APPEALS

1 No. 292

THE PEOPLE &c.,

Respondent,

v.

BERNHARD GOETZ,

Appellant.

MARK M. BAKER & BARRY SLOTNICK, NY City for *appellant* ROBERT M. MORGENTHAU, DA, NY County (GREGORY L. WAPLES of Counsel) for *respondent.*

MEMORANDUM

The order of the Appellate Division should be affirmed.

The trial court did not err in instructing the jury that, if it found that the People had proved each of the elements of the crime beyond a reasonable doubt, it "must" find defendant guilty. It is well settled that the jury's function is to apply the legal definition of the crime to the evidence and to convict if it is satisfied that each of the elements of the crime has been established beyond a reasonable doubt (*People v Mussenden,* 308 NY 558, 562; *see, Sparf v United States,* 156 US 51; *Duffy v People,* 26 NY 588, 592-593). While there is nothing to prevent a petit jury from acquit-

ting although finding that the prosecution has proven its case, this so called "mercy-dispensing power", as defendant concedes, is not a legally sanctioned function of the jury and should not be encouraged by the court (*People v Mussenden, supra, at* 562-562; *see, People v Boettcher,* 69 NY2d 174, 180; *People v Sullivan,* 68 NY2d 495, 500-501). Contrary to defendant's assertion, the jury instruction does not amount to a directed verdict because it does not encroach upon the jury's exclusive fact-finding prerogative by removing from its consideration some element of the crime or of a defense to it (*cf. United States v Hayward,* 420 F2d 142 [DC Cir 1969]; *Brascomb v State,* 550 SW2d 450 [Ar 1977]).

There is no merit in defendant's argument that the sentencing court abused its discretion, as a matter of law, or that it failed to exercise discretion in determining that a one year definite sentence would not be "unduly harsh" (*see,* Penal Law § 70.02[2][c]).

• • • • • • • • • • •

Order affirmed in a memorandum. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided November 22, 1988

NO. 88-1122

FILED
FEB 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term 1988

BERNHARD GOETZ,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
(212) 553-9000

MARK DWYER
GREGORY L. WAPLES
ASSISTANT DISTRICT ATTORNEYS
Of Counsel

IN THE

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF THE QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT....	7
CONCLUSION.....	24

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the trial court's instruction, which merely advised the jury, in a perfectly balanced fashion, both that it "must" convict petitioner if it found all of the elements of the illegal gun charge had been proven beyond reasonable doubt and that it "must" acquit him if it found the proof insufficient to sustain any element of that charge, coerce the jury into returning a verdict of guilty in violation of petitioner's Sixth and Fourteenth Amendment rights to trial by jury?

TABLE OF AUTHORITIES

CASES	PAGES
Brascomb v. State, 261 Ark. 614, 550 S.W.2d 450 (1977).....	12
Commonwealth v. Fernette, 398 Mass. 658, 500 N.E.2d 1290 (1986).....	9
Horning v. District of Columbia, 254 U.S. 135 (1920)....	19-21
Killian v. United States, 368 U.S. 231 (1961).....	17
People v. Cargile, 83 Mich. App. 361, 268 N.W.2d 258 (1978).....	9,12-13
People v. Gillespie, 54 Mich. App. 419, 221 N.W.2d 246 (1974).....	12
Sparf v. United States, 156 U.S. 51 (1895).....	16
State v. Devoe, 301 A.2d 541 (Me. 1973).....	9
State v. Foyte, 43 Idaho 459, 252 P. 673 (1927).....	9
State v. Lovelace, 227 Kan. 348, 607 P.2d 49 (1980).....	9
State v. Maloney, 126 N.H. 235, 490 A.2d 772 (1986).....	9
State v. Ragland, 105 N.J. 189, 519 A.2d 1361 (1986).....	9

TABLE OF AUTHORITIES (cont'd)

CASES	PAGES
Straughter v. State, 247 A.2d 202 (Del. 1968).....	9
United States v. Baker, 24 F. Cas. 962 (C.C.S.D.N.Y. 1861) (No. 14,501).....	15
United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980).....	9
United States v. Bennett, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879) (No.14,571).....	14
United States v. Buzzo, 85 U.S. (18 Wall.) 125 (1873)...	22
United States v. Gleason, 25 F. Cas. 1335 (C.C.D. Iowa 1867)(No. 15,216).....	15
United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969).....	10-11
United States v. Jackalow, 66 U.S. (1 Black) 484 (1861).....	22
United States v. Johnson, 462 F.2d 423 (3rd Cir. 1972), cert. denied, 410 U.S. 937 (1973).....	9
United States v. Jones, 26 F. Cas. 644 (C.C.D. N.Y. 1824) (No. 15,493).....	15
United States v. Keene, 26 F. Cas. 694 (C.C.D. Ill. 1853) (No. 15,512).....	15

TABLE OF AUTHORITIES (cont'd)

CASES	PAGES
United States v. Kennedy, 26 F. Cas. 762 (C.C.D.Pa. 1921) (No. 15,525).....	15
United States v. Kerley, 838 F.2d 932 (7th Cir. 1988).....	8-9
United States v. Kozminski, 108 S.Ct. 2751 (1988).....	17
United States v. McGlue, 26 F. Cas. 1093 (C.C.D. Mass. 1851)(No. 15,679).....	15
United States v. Mitchell, 26 F. Cas. 1276, 1277 (C.C.D. Pa. 1831) (No. 15,787).....	15
Watts v. United States, 362 A.2d 706 (D.C. App. 1976).....	9

OTHER AUTHORITIES

Rules of the Supreme Court, Rule 17.....	7

No. 88-1122

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BERNHARD GOETZ,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

On Petition for Writ Of
Certiorari to the Court of
Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner Bernhard Goetz, the notorious "subway gunman," seeks a writ of certiorari to review a November 22, 1988 judgment of the New York Court of Appeals. That judgment affirmed a June 28, 1988 order of the New York Supreme Court, Appellate Division, First

Department, which simultaneously affirmed a judgment of conviction and vacated a judgment of sentence entered in New York Supreme Court on October 19, 1987. Following a jury trial, Goetz was found guilty of Criminal Possession of a Weapon in the Third Degree (New York Penal Law §265.02[4] [McKinney 1980]) and sentenced to concurrent terms of six months imprisonment and five years probation.

STATEMENT OF THE CASE

On December 22, 1984, Bernhard Goetz drew an unlicensed revolver from his "quick-draw" holster, and then shot and seriously wounded four teenagers on a New York City subway train, after one of the youths approached him and asked for five dollars. Goetz fled from the subway car and, ultimately, from New York City as well; nine days later, he surrendered

to authorities in Concord, New Hampshire.

New York County grand juries eventually indicted Goetz for attempted murder, assault, reckless endangerment and various weapons offenses. After two years of pre-trial skirmishing and a protracted process of jury selection, Goetz's trial began in late April 1987. On June 16, 1987, a petit jury found petitioner guilty of possessing an unlicensed pistol in the subway car, but acquitted him of all other charges. On October 19, 1987, the trial judge sentenced Goetz to six months imprisonment, fined him $5000 and placed him on five years probation. As conditions of probation, Goetz was directed to undergo psychiatric counselling and perform community service. People v. Goetz, 137 Misc.2d 380, 520 N.Y.S.2d 919 (Sup. Ct. N.Y.Co.

1987). Goetz remained free on bail pending appeal.

On direct appeal to the Appellate Division of New York Supreme Court, petitioner challenged the validity of both his conviction and his sentence. Specifically, Goetz contended that the trial judge's charge, in which he instructed the jury that it "must" convict petitioner if it found the prosecutor had proven, beyond a reasonable doubt, each of the elements of the crime of Criminal Possession of a Weapon in the Third Degree, effectively directed the jury to return a verdict of guilty in violation of his Sixth and Fourteenth Amendment rights, and rights secured by the New York State Constitution.*

---

*During its charge, the court outlined the elements of the indictment's thirteen counts. Then, after summarizing

(continued...)

The Appellate Division rejected petitioner's challenge to the jury instruction and affirmed his conviction.

---

*(...continued)
the statutory components of each charge, the court advised the jury that it "must" acquit Goetz if the prosecution failed to prove one or more of those elements beyond a reasonable doubt. Conversely, the jury was instructed that it "must" convict petitioner if it found the prosecution had sustained its burden of proof. The court's exact instruction with respect to the count of Criminal Possession of a Weapon in the Third Degree was as follows:

> Therefore, with respect to count one of the indictment if you find that the People have proved to your satisfaction beyond a reasonable doubt each of the five elements as I have just explained them, then you must find the defendant guilty of the crime of criminal possession of a weapon in the third degree.
>
> On the other hand, if you find that the People have failed to prove to your satisfaction beyond a reasonable doubt, any one or more of these five elements, then you must find the defendant not guilty of criminal possession of a weapon in the third degree.

However, the court agreed that petitioner's sentence was invalid as a matter of state law and remanded the case for resentencing. People v. Goetz, 141 A.D.2d 446, 529 N.Y.S.2d 782 (1st Dep't 1988).

Upon further review, the New York Court of Appeals unanimously affirmed the Appellate Division's determination that the "must" convict instruction violated no state or federal constitutional guarantee. People v. Goetz, 73 N.Y.2d 751, __ N.E.2d __, __ N.Y.S.2d __ (1988). On January 13, 1989, after Goetz filed this petition for certiorari, the trial judge resentenced him to a jail term of one year without ensuing probation, and a fine of $5000. Petitioner has not sought any stay of that sentence and is presently incarcerated.

Petitioner now seeks a writ of certiorari to review that part of the New

York Court of Appeals' decision which held that the "must" convict instruction did not abridge any right to trial by jury protected by the Sixth and Fourteenth Amendments to the United States Constitution.

REASONS FOR DENYING THE WRIT

As a general rule, this Court will grant certiorari only when compelling reasons demand review of a case by the highest tribunal in the land. For example, this Court may grant certiorari if a conflict among the decisions of lower courts results in the inequitable administration of justice across the country, or when a lower court decides an important question of federal law which the Supreme Court has not, but should, settle. Rules of the Supreme Court of the United States, Rule 17 (1988). This case presents no extraordinary

circumstance warranting the investment of this Court's scarce and valuable time.

1. There Is No Conflict Among Decisions Of The Federal Courts of Appeal, Or Between State And Federal Appeals Courts, Which Requires Resolution By The Supreme Court.

Petitioner first urges this Court to grant certiorari to resolve a purported division among the federal courts of appeal, and between the state and federal courts, over the propriety of "must" convict-type jury instructions. But this conflict exists only in petitioner's imagination. In fact, every state and federal appeals court which has addressed the issue has upheld the instruction challenged in this case, or its functional equivalent.*

---

*See, e.g., United States v. Kerley, 838 F.2d 932, 940 (7th Cir. 1988) (upholding "should" conviction instruction, (continued...)

The cases cited by Goetz in his

---

*(...continued)
where "should" was "imperative," not "hortatory"); United States v. Bejar-Matrecios, 618 F.2d 81, 85 (9th Cir. 1980) (upholding "duty to convict" instruction); United States v. Johnson, 462 F.2d 423, 429 (3rd Cir. 1972), cert. denied, 410 U.S. 937 (1973) (approving "sworn duty to find [defendant] guilty" instruction); Watts v. United States, 362 A.2d 706, 709-11 (D.C. App. 1976) (approving "must find [defendant] guilty" instruction); State v. Ragland, 105 N.J. 189, 519 A.2d 1361, 1366-69 (1986) (approving "must find [the defendant] guilty" instruction); State v. Maloney, 126 N.H. 235, 490 A.2d 772, 775 (1985) (upholding "must return verdict of guilty" instruction; although "should" convict preferable, use of "must" was "immaterial and harmless"); Commonwealth v. Fernette, 398 Mass. 658, 500 N.E.2d 1290, 1297-98 (1986) (approving "must return verdict of guilty" instruction); State v. Devoe, 301 A.2d 541, 545-46 (Me. 1973) (approving "must find" defendant guilty instruction); Straughter v. State, 247 A.2d 202, 203-04 (Del. 1968) (upholding "must" convict instruction); People v. Cargile, 83 Mich. App. 361, 268 N.W.2d 258, 259 (1978) (approving "should" convict instruction); State v. Lovelace, 227 Kan. 348, 607 P.2d 49, 55 (1980) (approving "must" convict instruction; "no substantial difference" between "must" and "should"); State v. Foyte, 43 Idaho 459, 252 P. 673, 674 (1927) (approving "duty to find" defendant guilty instruction).

petition for certiorari (Petition at 16-17), which purportedly are contrary to the many decisions recited above, do not in fact conflict with any of those holdings. In United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969), for example, a murder defendant presented an alibi defense. The trial court charged the jury that "if ... you find that the Government has proved beyond a reasonable doubt that the Defendant was present at the time when and at the place where the offense charged was committed, then you must find the Defendant guilty" (emphasis in original). Politely characterizing the trial court's use of the word "must" an "honest oversight," the D.C. Circuit reversed the conviction, holding that the charge had trenched upon Hayward's Sixth Amendment right to a trial by jury. Id. at 144.

However, even a casual reading of the Hayward opinion discloses that the constitutional error identified there lay not in the trial judge's use of "must" convict language; what was wrong was the context in which that mandatory term was employed. The appeals court concluded that the charge was objectionable because, in practical effect, it directed the jurors to convict if they merely found that the defendant was present at the scene when the murder took place, without regard to whether the prosecution had established any or all of the statutory elements of the crime of murder. Nothing in Hayward can be read to condemn an instruction which simply reminds a jury of its duty to convict where all elements of an offense have properly been proven beyond reasonable doubt.

Similarly, Brascomb v. State, 261 Ark. 614, 550 S.W.2d 450 (1977), faulted an instruction which stated that the jury "should" convict if it found that the defendant committed the offense. The defendant had asserted an entrapment defense which involved an admission that the offense took place. The Arkansas Supreme Court rightly held that the instruction was erroneous because it effectively foreclosed the jury from considering the merits of the entrapment claim. Brascomb did not hold that a mandatory instruction properly embracing all of the facts of the case, all elements of the crime and all defenses would have been improper.*

---

*Petitioner also relies upon People v. Gillespie, 54 Mich. App. 419, 221 N.W.2d 246 (1974), but reads too much into the unusual facts underlying that intermediate appeals court opinion. In fact, only four years later, the same court approved an instruction

(continued...)

In short, there is not now -- and never has been -- the slightest conflict of opinion among the federal and state appeals courts about the constitutionality of the kind of instruction delivered to petitioner's jury. Thus, it is totally unnecessary for this Court to seize the opportunity afforded by this case to proclaim a uniform rule of constitutional procedure applicable throughout the land.

2. This Case Presents No Important And Unsettled Question Of Law Deserving Of Review By The Supreme Court.

No more persuasive is Goetz's suggestion that his petition raises an unresolved question of law of vital importance to the administration of

---

*(...continued)
admonishing a jury that it "should" convict an accused where guilt has been proven beyond reasonable doubt. People v. Cargile, 83 Mich. App. 461, 268 N.W.2d 258 (1978).

criminal justice. In fact, for more than 150 years, members of this Court, and the Court itself, have repeatedly approved jury instructions not markedly different from the one upheld by the New York Court of Appeals. Thus, even in the absence of an explicit holding from this Court, the constitutional propriety of the challenged instruction cannot be seriously disputed.

Beginning at least as early as 1821, Justices of this Court, while presiding over criminal trials in the old federal circuit courts, routinely charged juries that they were under a duty to find an accused guilty where the prosecution satisfied its burden of proof.*

---

*See, e.g., United States v. Bennett, 24 F. Cas. 1093, 1102 (C.C.S.D.N.Y. 1879)(No. 14,571)(Blatchford, J.)("it will be your duty to find the prisoner guilty if

(continued...)

Concededly, in none of those cases did the Circuit Justice expressly reject the constitutional contentions advanced in Goetz's petition. Nevertheless -- particularly in the context of an allegation that a commonplace jury instruction deprives an accused of familiar and fundamental constitutional

---

*(...continued)
United States v. Gleason, 25 F. Cas. 1335, 1338 (C.C.D. Iowa 1867) (No. 15,216) (Miller, J.)("it is your duty to say so [i.e., pronounce defendant guilty] by your verdict"); United States v. Baker, 24 F. Cas. 962, 965 (C.C.S.D.N.Y. 1861)(No. 14, 501)(Nelson, J.)("duty to convict"); United States v. Keene, 26 F. Cas. 694, 695 (C.C.D. Ill. 1853)(No. 15, 512)(McLean, J.) ("you will find the defendant guilty"); United States v. McGlue, 26 F. Cas. 1093, 1097 (C.C.D. Mass. 1851)(No. 15, 679)(Curtis, J.)("you will find him [defendant] guilty"); United States v. Mitchell, 26 F. Cas. 1276, 1277 (C.C.D. Pa. 1831)(No. 15, 787)(Baldwin, J.)("you will find [defendants] guilty"); United States v. Jones, 26 F. Cas. 644, 648 (C.C.D.N.Y. 1824) (No. 15, 493) (Thompson, J.)("duty to say so [i.e., pronounce defendant guilty]"); United States v. Kennedy, 26 F. Cas. 762 (C.C.D. Pa. 1821) (No. 15,525) (Washington, J.) ("should find [defendants] guilty").

rights -- the unwavering historical acceptance of peremptorily-phrased charging language by so many members of this nation's constitutional court of last resort assumes telling significance.

Far more importantly, this Court as a collegial body gave that historical practice a ringing endorsement in Sparf v. United States, 156 U.S. 51 (1895). In an exhaustive and seminal opinion exploring the constitutional relationship and allocation of power between the judge and the jury in a criminal case, Justice Harlan cited with unqualified approval state court instructions advising jurors that they "must" or had a "duty" to convict where the prosecution met its burden of proof. Id. at 85. This Court has never retreated from that view. To the contrary, since Sparf this Court has repeatedly quoted, without the slightest

disapproval, jury instructions not materially different from the one delivered to petitioner's jury. See, e.g., Killian v. United States, 368 U.S. 231, 249 n.5 (1961) ("must find the defendant guilty"); United States v. Kozminski, 108 S.Ct. 2751, 2774 (1988) ("your verdict will be guilty").

In light of the foregoing authorities, it should be readily apparent that the question presented in Goetz's petition involves no open and troubling issue of law demanding this Court's attention. Still, Goetz insists that a jury instruction which this Court has repeatedly endorsed is constitutionally flawed. The essence of his argument seems to be that the mandatorily-cast, "must" convict instruction coerced his jury into returning a guilty verdict and therefore deprived him of his right to a trial by

jury. This thesis is legally untenable and logically unsound; the New York Court of Appeals was surely correct in repudiating it.

In the first place, although petitioner speculates that a "must" convict instruction improperly pressures juries into returning guilty verdicts, it is far from self-evident how or why that phenomenon should occur. As a matter of logic, it is extremely difficult to fathom how a jury is coerced, one way or the other, by an instruction that merely bespeaks a duty to return a verdict of guilty if the prosecutor proves his case beyond a reasonable doubt, and a corresponding duty to acquit if the evidence falls short of that constitutional threshold. In truth, such an instruction is perfectly neutral, and no more coerces a conviction than it does an acquittal. Indeed, complete proof that

Goetz's jury was not coerced by the trial court's language into unjustly convicting him is readily at hand: although the presiding judge employed similar language when he summarized the elements of the twelve other counts in the indictment, the jury acquitted petitioner on all of those charges.

Justice Holmes' opinion in Horning v. District of Columbia, 254 U.S. 135 (1920), further demonstrates how spurious petitioner's constitutional objections are. In Horning, the trial judge charged the jury, among other things:

> that there really was no issue of fact for them to decide;... that the course of dealing constituted a breach of the law; that it was their duty to accept this exposition of the law; that in a criminal case the Court could not peremptorily instruct them to find the defendant guilty but that if the law permitted he would;... that a failure to bring in a verdict could only

> arise from a flagrant disregard of the evidence, the law, and their obligation as jurors;... that he could not tell them in so many words to find the defendant guilty but that what he said amounted to that; that the facts proved were in accord with the information and that the Court of Appeals had said that that showed a violation of law. Id. at 137-38.

In upholding the foregoing instructions, Justice Holmes unequivocally ratified the trial judge's "right and duty" to direct what verdict a criminal jury should render upon certain facts:

> The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less

when the facts are agreed. Id. at 138.

Horning demolishes the notion, crucial to petitioner's argument here, that there is a distinction, of constitutional dimension, between a jury's finding that all elements of a charge have been proven, and the "ultimate guilt" of an accused (Petition at 8, 14). Under our constitutional scheme, a jury's fact-finding responsibility ends once it determines that the prosecution has fulfilled its burden of proof on a particular charge, because that is all that is necessary to establish the accused's guilt. "Ultimate guilt" is not a separate and additional fact that the jury must also find before convicting a defendant.

Undoubtedly, it is the sole and exclusive responsibility of the petit jury in every criminal trial to decide

whether the prosecution has proven the factual elements of any crime. The trial judge so charged the jury that convicted petitioner, and petitioner does not contend otherwise. But once the jury completes that fact-finding inquiry, it is within the constitutional province of the court to determine, as a matter of law, what legal consequences flow from the jury's findings. The judge may do this either by charging the jurors, as was done in this case, that they are duty-bound to convict the accused if they find that certain facts have been proven, or by the court itself entering a special verdict of guilty upon the jury's answers to special interrogatories. See United States v. Buzzo, 85 U.S. (18 Wall.) 125 (1873); United States v. Jackalow, 66 U.S. (1 Black) 484 (1861). In neither case does the court trespass, to even the slightest extent, upon the

constitutionally protected fact-finding power of the petit jury. Certainly, such action does not amount to the unlawful direction of a guilty verdict.

In sum, the decision of the New York Court of Appeals, upholding the "must" convict instruction, was faithful to the jurisprudence of this Court extending back over 150 years, and fully comported with the guarantees of trial by jury and due process of law. As a uniform body of caselaw from both state and federal courts attests, there was nothing unique, or even unusual, about the Court of Appeals' determination of the question presented by Goetz. Since that is so, his petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

MARK DWYER
GREGORY L. WAPLES
Assistant District Attorneys
Of Counsel

February, 1989